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IN THE

Supreme Court of the United States.

October Term, 1929.

No. 352.

GEMCO MANUFACTURING COMPANY, a Corporation,
Petitioner,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

GEORGE M. WILMETH,
Attorney for Petitioner.

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OPINION OF THE COURT BELOW.

The opinion of the Court of Claims (R. 9–10) was announced on March 11, 1929, but has not yet been reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The petitioner corporation is the manufacturer and distributor, among other things, of bumpers for use on automobiles of various makes and designs. It manufactures and sells not only complete bumper assemblies, ready to be affixed or attached to automobiles, but also manufactures and sells to the automotive trade replacement parts for such bumpers, these replacement parts consisting of bars, brackets and fittings. These bumper parts are sold as separate articles or items, and are used principally by garages and repairmen, to replace damaged and broken parts of bumpers. Separate and complete records are kept of all sales of bumper parts, as distinguished from complete bumpers or bumper assemblies.

On all sales of complete bumpers or bumper assemblies, pe-

titioner corporation made proper return and payment of the tax imposed under subdivision (3) of Section 900 of the Revenue Act of 1921, and makes no contention that this tax was not properly and legally assessed and collected.

However, on sales of parts for bumpers, between the dates of November 1, 1922, and July 2, 1924, petitioner corporation was required to pay taxes in the amount of $32,040.86, notwithstanding the fact that the taxing statute imposed no tax on sales of *parts for accessories*, but only on sales of complete accessories.

Claim for refund of the $32,040.86 so paid on sales of bumper parts was duly filed with the Commissioner of Internal Revenue, and rejected or disallowed by the Commissioner, whereupon suit was instituted in the Court of Claims for recovery of this amount.

Subdivision (3) of Section 900 of the Revenue Act of 1921 (42 Stats. 227), under alleged authority of which the taxes sought to be recovered were levied, assessed, collected and paid, imposed a tax on the manufacturers' sale of "parts" or "accessories" for any of the articles *enumerated in subdivision (1) or (2)* of such section.

The articles enumerated in said subdivisions (1) and (2), as found by the Court of Claims in its decision in the case of *Martin Rocking Fifth Wheel Co.* v. *The United States* (60 Ct.Cls. 466), are (1) automobile trucks, (2) automobile wagons, (3) other automobiles, and (4) motor cycles. Bumpers are not enumerated in subdivision (1) or (2), but are "accessories," enumerated or included in subdivision (3), and it is the contention of petitioner corporation that since subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on sales of "parts" for only the articles enumerated in subdivisions (1) and (2), and not on sales of parts for articles enumerated in subdivision (3), the taxes so paid by it were collected without authority of law.

QUESTION TO BE DECIDED.

The case presents for determination by the Court the question of whether bumper parts manufactured and sold by pe-

titioner corporation are "parts" for articles enumerated in subdivision (1) or (2), within the meaning of subdivision (3) of Section 900 of the Revenue Act of 1921.

STATUTES AND DEPARTMENTAL REGULATIONS INVOLVED.

The provisions of Section 900 of the Revenue Act of 1921 (42 Stats. 227), under alleged authority of which the taxes involved were levied, assessed, collected and paid; and the pertinent provisions of the Departmental Regulations (No. 47) relating thereto, are quoted at pages 4 and 5 of the record herein.

ASSIGNMENTS OF ERROR.

I.

The question decided by the Court of Claims is an important one involving interpretation of a Federal taxing statute which has not been, but should be, definitely settled by this Court, in justice to many manufacturers of parts for accessories on sales of whose products taxes have been levied without authority of law.

II.

The decision of the Court of Claims is contrary to the principle laid down by that Court in interpreting subdivision (3) of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), the language of which is identical with that of the provision of the 1921 Act here involved, in the case of the *Martin Rocking Fifth Wheel Co.* v. *The United States*, 60 C. Cls. 466.

III.

The decision of the Court of Claims is inconsistent with the decision rendered by that Court, on February 4, 1929, in the case of the *Auburn Rubber Co.* v. *The United States* (No. H-433), interpreting the same provision of the taxing statute here involved, in which decision it was held that patches and reliners for tires enumerated in subdivision (3) were not subject to the tax imposed under that subdivision.

IV.

The decision of the Court of Claims violates the rule laid down in the cases of *Gould* v. *Gould* (245 U. S. 151) and *United States* v. *Merriam* (263 U. S. 179), heretofore universally followed by the Federal Courts, in that it extends the application of Section 900 (3) of the Revenue Acts of 1921 so as to bring within its scope articles or things which are not enumerated or included therein.

ARGUMENT.

The decision of the Court of Claims states that the issue involved has been many times before the Court, in the cases cited therein. It is respectfully pointed out that this statement by the Court is in error. In the present case, the sole question involved is whether subdivision (3) of Section 900 imposed a tax on sales of parts for articles enumerated in that subdivision.

In the cases of the *Cole Storage Battery Co.* v. *The United States*, 65 C. Cls. 164, and *Walker Mfg. Co.* v. *United States*, 65 C. Cls. 394, referred to by the Court, the question involved was not the taxability of parts of batteries or parts of jacks. As a matter of fact, the Treasury Department had held that parts of storage batteries and parts of lifting jacks *were not subject to tax* under subdivision (3) as "parts for articles enumerated in subdivision (1) or (2)." (S. T. 367–C. B. 6–1922–p. 443). The question presented for determination by the Court in these two cases was whether complete storage batteries and complete lifting jacks were "parts or accessories for automobiles," as distinguished from commercial commodities adaptable for general use, and the Court properly held that they were such "parts or accessories" within the meaning of the taxing Acts.

In the case of *Advance Automobile Accessories Corporation* v. *United States*, 66 C. Cls. 304, referred to by the Court, the question involved was whether the statute imposed a tax on repair material, and whether the operation of clipping a non-taxable repair material into short lengths of the approximate measurement for relining a transmission band constituted the manufacture of an automobile part.

In the cases of *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511, and *Worth Bros. Co.* v. *Lederer*, 251 U. S. 507, referred to by the Court, the question to be determined was whether certain articles specifically taxed by the statute there involved were taxable when sold by the manufacturers thereof in a more or less unfinished condition.

The statute involved in these last three cases (Par. 301, 39 Stat. at L. Ch. 463; p. 781; Comp. Stat. Par. 6336¼b., Fed. Stat. Anno. Supp. 1918, p. 350) imposed a tax, not upon the sales price, but upon the *profits* derived from the manufacture of "projectiles, shells or torpedoes, * * * or *any part of any of the articles mentioned*."

The statute involved in the present case does not use such broad and inclusive language, but definitely specifies the "parts" to be taxed. Subdivisions (1) and (2) of Section 900 of the Revenue Act of 1921 imposed certain taxes upon the manufacturers' selling price of complete automobile trucks, automobile wagons, other automobiles and motor cycles, and, recognizing that *replacements* on automobiles became necessary from time to time, and that such *replacements* could properly bear a like burden, Congress imposed under subdivision (3) a tax on the manufacturers' selling price of "tires, inner tubes, parts or accessories for any of the articles *enumerated in subdivision (1) or (2)*." It is submitted that this definite mention of articles enumerated in subdivision (1) or (2) is very much more restrictive than the broad term "*any part of*" used in the Munitions Tax Act, and was designed for the purpose of levying a tax on the sale, *for replacement purposes*, of complete "tires," "inner tubes," "accessories" and "parts" for the articles enumerated in subdivisions (1) and (2), when such complete units were needed as replacements, and was not intended to tax parts or materials sold for use in repairing or reconditioning, and thus prolonging the life of articles enumerated in subdivision (3). (*National Rubber Filler Co.* v. *United States*, 63 C. Cls. 337.) If Congress had desired to tax parts for articles enumerated in subdivision (3), it would have been a simple matter to definitely accomplish this purpose by inserting after the words "subdivision (1) or (2),"

the words "*or in this subdivision,*" but this was not done, and petitioner submits that the language used was not intended to impose a tax upon parts for articles enumerated in subdivision (3).

The Treasury Department, as a general rule, has adopted this interpretation, as is indicated by its ruling on plate glass. (O. D. 133, S. T. 621–257.) In this ruling it was held that "plate glass cut to size and shape for use in automobile windshields is not subject to tax unless sold mounted in new frames." This shows that the Bureau interpreted the law as intending not to tax the repair of an old, broken windshield, by the installation of new glass, but only the sale of a complete new windshield, including the glass and frame. The same principle was laid down in the Departmental ruling on top recovering, S. T. 392–I–39–525 held that the recovering of old automobile top bows was not subject to tax, but that the sale of a complete new top, including top bows and bow sockets, was taxable. This interpretation of the statute was also followed in the ruling on radiators. A complete radiator, consisting of the core and upper and lower tanks, soldered together, was held taxable as a "part," but S. T. 448–III–19–1552 held that radiator cores and upper and lower tanks, sold separately, were not subject to the tax imposed by subdivision (3).

Among other articles which have been held nontaxable in accordance with this interpretation of the statute may be mentioned the following: Parts of generators, parts of starters, parts of magnetos, cross chains for anti-skid chains, top decks, side quarters, back curtains, plate glass cut to size and shape for doors and windows, chains cut to length, retread bands for tires, reliners for tires, parts of distributors, spokes and felloes for wheels, etc. (See list of articles held nontaxable, pages 123–4, Record of Hearing before the Subcommittee of the House Committee on Appropriations on First Deficiency Appropriation Bill, 1927, 69th Congress, Second Session; also O. D. 100, S. T. 4–21–215; S. T. 394, C. B. December, 1922, p. 295, and Par. 2012–32, C. C. H. Tax Service, 1927.)

In the *Worth Bros. Co.* case, *supra*, an entirely different class of tax was involved. It was not measured by the sales price, as under Section 900, but by the profit realized, and the Muni-

tions Tax Act made no separation of the complete projectiles and the parts thereof. They were all grouped together under one provision of the Act, and the profits on all were taxed at the same rate. The term "any part of," used in that Act, did not permit of a distinction between a semi-finished and a finished part, and the language of the statute makes it clear that Congress intended to tax not only manufacturers of complete shells, torpedoes and projectiles, but every person making a profit from the manufacture and sale of any and all parts of such articles.

As stated above, the questions involved in all of the cases mentioned in the decision of the Court of Claims are entirely different from the one involved in the present case. Petitioner freely admits that complete bumpers manufactured and sold by it were taxable under the provisions of subdivision (3) of Section 900, but contends that subdivision (3) imposed no tax on sales of parts for articles enumerated in that subdivision.

SUBDIVISION (3) IMPOSED NO TAX UPON PARTS FOR ARTICLES ENUMERATED IN SUBDIVISION (3) BUT ONLY UPON PARTS FOR ARTICLES ENUMERATED IN SUBDIVISIONS (1) AND (2).

The sole question presented, then, is what are the articles enumerated in subdivisions (1) and (2)?

Consideration of the provisions of the statute, and the purpose of the language used, must necessarily lead to the conclusion that, for the purposes of subdivision (3), the only articles *enumerated* in said subdivisions (1) and (2) are the *complete vehicles* specified therein.

The first clause or paragraph of Section 900 provides for a tax on sales made by only the *manufacturer*, *producer* or *importer*. Subdivision (1) specifies the rate of tax to be paid by such manufacturers, producers and importers, on sales of complete automobile trucks and automobile wagons. Subdivision (2) specifies the rate of tax to be paid on sales of all other complete automobiles and motor cycles. These taxes were payable only on sales made by the manufacturer, producer or importer, and no tax was imposed on the resale by the distributor or dealer.

After providing for a tax on the sale of the complete vehicles enumerated in subdivisions (1) and (2), Congress further provided, in subdivision (3), for a tax on tires, inner tubes, replacement parts and accessories, when sold by the manufacturer, producer or importer thereof "*to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2)*" (i. e. complete automobile trucks, automobile wagons, other automobiles and motor cycles). By making the tax under this subdivision applicable only to *sales to persons other than manufacturers* liable for the taxes imposed under subdivisions (1) and (2), specific exemption was provided for sales made *to such manufacturers*. The clear intent and purpose of this exemption of sales to such manufacturers and producers is to avoid a double tax on any portion of the complete vehicles which are specifically taxed as such under subdivisions (1) and (2).

The reason for providing this exemption of sales of parts and accessories to manufacturers of the complete vehicles, as well as the reason for the use of the word "producer," was the well recognized fact that many automobiles were an entirely assembled product, and that the "producers" thereof actually manufactured nothing. The bodies, engines, radiators, axles, wheels, rims, tires, springs, fenders, etc., from which the complete cars were assembled by such producers were all made by different manufacturers of the respective articles, and the purpose of the Act was to levy a tax on the producer's sale of the complete vehicle, and then, if replacement of any of the component parts, or of the accessories, became necessary, to levy a tax on the sale of such *replacements* or extra equipment, by the manufacturers thereof. The fact that the word "importer" was omitted from subdivision (3) is significant on this point, as showing that there was no intent to exempt sales of parts or accessories when made to the importer of cars completely manufactured in a foreign country.

After providing exemption for articles enumerated in subdivision (3), when sold to manufacturers or producers of complete vehicles, because of the fact that the tax levied by Section 900 applied to sales made only by the *actual manufacturer, producer* or *importer*, it was necessary, in order to insure collec-

tion of tax on any parts or accessories purchased by the producer of the complete car under this exemption, and sold as extra equipment (rather than as component parts of the complete vehicle) to make the terms "automobile trucks," "automobile wagons," "other automobiles" and "motor cycles" inclusive of this extra equipment, and this was done by inserting, parenthetically, in subdivisions (1) and (2), the words "(including tires, inner tubes, parts, and accessories therefor, *sold thereon or in connection therewith or with the sale thereof*)."

Since the situation with regard to the manufacture or production of tires, inner tubes, parts, and accessories is entirely different from that existing with respect to the production of complete automobiles, there was no reason to provide for exemption of sales of "parts" for the articles enumerated in subdivision (3), to manufacturers or producers. The articles enumerated in subdivision (3) are not produced by the assembling of "parts" for the same purchased from various manufacturers. Each tire, inner tube, part, or accessory, is wholly manufactured and sold in the finished state by the manufacturer thereof, and there could be no danger of a double tax having been paid on any portion of the same when sold by him.

It must follow, therefore, that if there was no danger of a double tax on the manufacturer's sale of tires, inner tubes, parts, or accessories manufactured by him, *there was no reason for providing exemption for sales of parts of the same*, and that the word "parts" used in subdivision (3) must, accordingly, mean only *parts for the complete vehicles enumerated in subdivisions (1) and (2)*, and not parts for any of the extra equipment parenthetically mentioned in these subdivisions.

If it is held that the term "any of the articles enumerated in subdivision (1) or (2)" means not only the complete vehicles specified, but also the articles parenthetically mentioned, then it must necessarily be held, also, that any manufacturer of tires, inner tubes, parts, or accessories was entitled to exemption on all sales of his product made to any other manufacturer of tires, inner tubes, parts, or accessories. Such a construction of the statute would open the door for serious evasions of tax. Under such a construction, a manufacturer of tires, for instance, would

be legally entitled to sell his entire product, *tax free*, to a manufacturer of bumpers, and since the tax is collectible only from the *actual* manufacturer or producer, and since there is no provision in subdivision (3) requiring a manufacturer of bumpers to pay tax on sales of his product (including tires, inner tubes, parts, or accessories, sold in connection with the sale thereof), such manufacturer of bumpers could resell the tires purchased by him from the tire manufacturer under the statutory exemption, without incurring liability under the statute for any tax other than that due on sales of products actually manufactured by him.

The position that the term "parts" as used in subdivision (3) related only to parts for the complete vehicles enumerated in subdivisions (1) and (2) is supported by the decision in *Martin Rocking Fifth Wheel Co.* v. *United States* (60 C. Cls. 466), wherein the Court, interpreting identical language of the Revenue Act of 1918 (40 Stats. 1122), said:

> "'Parts' as used in that paragraph, are 'parts' *for* [italics ours] the articles enumerated in paragraphs (1) and (2), which are 'automobile trucks,' 'automobile wagons,' 'other automobiles,' and 'motor cycles,' 'except tractors.'"

Bumpers are not enumerated in subdivision (1) or (2), and neither are they "parts" for articles enumerated in those subdivisions. They are *accessories* for the vehicles enumerated in subdivisions (1) and (2). They are not necessary to the operation of the vehicle, but are attached merely for the purpose of affording protection in case of collision. It is a well known fact, of which the Court may properly take judicial notice, that it is only within comparatively recent years that bumpers have been used on automobiles. This fact definitely determines the character of the bumper as an "accessory," as distinguished from a "part." "Accessories" are not enumerated in subdivisions (1) and (2).

The parenthetical mention of tires, inner tubes, parts, and accessories in subdivisions (1) and (2) manifestly was intended for the sole purpose of fixing the rate of tax which should be paid on such parts and accessories when sold as a part of or as extra equipment in connection with the sale of the vehicles

enumerated in those subdivisions, namely, automobile trucks, automobile wagons, other automobiles and motor cycles. If such parts or accessories were sold with either of the two first named vehicles, the rate of tax was 3 per centum; while if sold with either of the two last named vehicles, the rate was 5 per centum. That, it is submitted, was the plain intent and sole purpose of the framers of the Act. Certainly the parenthetical mention in subdivisions (1) and (2) of tires, inner tubes, parts, and accessories did not mean and was not intended as an "enumeration" of these articles, for the purposes of subdivision (3).

To say that the parenthetical mention of parts and accessories in subdivision (2) constitutes an *enumeration* thereof is just exactly as reasonable as to say that the mention of the word "tractors" in the same subdivision constitutes an *enumeration* of such vehicles for the purposes of subdivision (3), and that consequently parts and accessories for tractors were taxed by subdivision (3), even though tractors were specifically exempted from the tax imposed by subdivision (2). Petitioner does not believe that this Court would subscribe to such a construction of the statute here involved, but such would be the result or effect of consistent application of the Department's holding that subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on parts of articles parenthetically included or in any way mentioned in subdivisions (1) and (2) of that section.

Treasury Department Regulations No. 47, Article 15 (R. 5) defines a "part" *for the vehicles enumerated* as "any article designed for the special purpose of being used *as or to replace a component part* of any such vehicle, * * *." Article 16 (R. 5) defines an accessory for the vehicles enumerated as "any article designed *to be attached to or used in connection with* such vehicle * * *." These definitions from the Departmental Regulations show not only that the Department made a clear distinction between "parts" and "accessories," but also that it was defining "parts" for the *vehicles* and "accessories" for the *vehicles*, and not parts or accessories for any of the other articles mentioned in subdivisions (1) and (2). However, notwithstanding this clear distinction between a "part" and an "accessory," the Department, in rejecting pe-

titioner's refund claim, stated that the claim was rejected for the reason that the Department held the articles involved where "*parts for automobiles*" within the meaning of the taxing statute. In spite of this manifestly erroneous statement, the Court of Claims upheld the action of the Department, apparently without realizing that there is a very definite distinction between a "part for an automobile" and an "accessory for an automobile," and that a "part for an accessory" is in no sense a "part for an automobile."

The Court of Claims held, in the case of the *Auburn Rubber Co.* v. *The United States* (H–433), decided February 4, 1929, that blow-out patches and reliners for tires were not taxable as parts or accessories for articles enumerated in subdivision (1) or (2). Obviously, the only theory on which this decision can be based is that the products involved are not accessories for articles enumerated in subdivision (1) or (2), *but are accessories for tires, enumerated in subdivision* (3). Petitioner submits that if "accessories" for articles enumerated in subdivision (3) are not subject to the tax imposed by that subdivision, then it necessarily follows that "parts" for articles enumerated in subdivision (3) are nontaxable for the same reason.

In the case of the *National Rubber Filler Co.* v. *The United States*, 63 C. Cls. 337, the product involved was neither a part nor an accessory for any of the vehicles enumerated in subdivision (1) or (2). It was an accessory for a tire, enumerated in subdivision (3), and the Court of Claims held that it was not within the power of the Commissioner of Internal Revenue to extend the provisions of the taxing statute so as to bring such a product within its scope. In discussing the question of whether the words "parts" and "accessories" used in the taxing statutes could be properly construed to include the rubber filler involved, the Court said:

> "Beyond doubt the articles enumerated specifically in subdivision (3) of Section 900 have no common meaning. Otherwise it would have been unnecessary to specify. In similar revenue legislation the same course has been pursued by Congress, and articles subjected to taxation carefully enumerated specifically. Reference to an article by its fixed trade name was obviously not intended to

reach another not so known or even so designated by the trade to which it is inseparably connected. * * * Surely not every article used in connection with a motor vehicle was intended to be taxed by the statute here involved. * * * Congress did not mention it in the statutes, and the doubt as to inclusion therein is made evident by the course of this proceeding."

IN CASE OF DOUBT, TAXING STATUTES ARE TO BE STRICTLY CONSTRUED AGAINST THE GOVERNMENT.

In the case of *Gould* v. *Gould*, 245 U. S. 151, cited by the Court of Claims in the *National Rubber Filler Co.* case, *supra*, the Supreme Court said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

And in *United States* v. *Merriam*, 263 U. S. 179, also cited by the Court of Claims in the *National Rubber Filler Co.* case, the Court said:

"On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

In the case of *Atwater Kent Mfg. Co.* v. *United States*, 62 C. Cls. 419, the Chief Justice said in delivering the opinion of the Court (p. 425):

"The context shows that the word 'parts' referred to in the acts should be given a restrictive meaning."

Again citing the *Martin Rocking Fifth Wheel Co.* case, we find that on this subject the Court said:

"And we must be mindful of the primary rule that only those things can be taxed which are by the law specifically made the subject of the tax or at least are within the plain import of the language used. The right of the Commissioner of Internal Revenue to levy a tax is a right which must be affirmatively derived from the taxing act."

CONCLUSION.

Petitioner's bumper replacement parts, like the products involved in the *Martin Rocking Fifth Wheel Co.* case, and the *Auburn Rubber Co.* case, *supra*, are not parts for articles enumerated in subdivision (1) or (2) of Section 900 of the Revenue Act of 1921, and were not, therefore, taxable under subdivision (3) of such section. The taxes imposed by subdivision (3) were applicable only to sales of parts of or accessories for articles enumerated in subdivisions (1) and (2), and not to parts of or accessories for articles enumerated in subdivision (3). While it is true that the bumpers for the repair of which the replacement parts involved were designed were attached to automobiles, and that petitioner's bumper replacement parts were, therefore, eventually attached to automobiles, as stated by the Court of Claims in the case of the *Atwater Kent Manufacturing Co., supra*, "The question is not whether they were 'parts' of *something* after they were attached to the one or another kind of machine to which they were attached and in which they could function, but whether they were sold as *parts of the articles mentioned in subdivisions (1) or (2)* of Section 900." (Italics supplied.)

It is submitted that the decisions followed by the Court of Claims are not in point, and that the decisions cited by petitioner herein are exactly in point; and that the principle laid down in these cases should be applied in the present case, and that petitioner should recover the taxes paid by it on sales of bumper replacement parts, with interest.

Respectfully submitted,

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